

01608

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

L. Kozlowski
Proc I

FILE: B-187469, B-187516, B-187557 **DATE:** March 11, 1977

MATTER OF: Wheeler Brothers, Inc.

DIGEST:

Since protester does not advance any additional facts or legal arguments which indicate that earlier decision was erroneous, prior decision holding cancellation of solicitation was proper is affirmed.

Wheeler Brothers, Inc., has requested reconsideration of our decision of November 11, 1976, which found that cogent and compelling reasons existed to permit cancellation of the invitations in question with resolicitation on the basis of revised terms and conditions.

The decision covered three separate invitations for bids (IFB), each based on a standardized Air Force-wide format which was used in solicitations for Contractor Automotive Parts Stores (COPARS). McCotter Motors, Inc. (McCotter), objected, prior to bid opening, to a paragraph which allowed the contracting officer to require additional price lists any time the nonprice listed (NPL) parts exceeded 30 percent of total sales for any 1 month at the same discount rate offered in the original bid. After bid opening, but prior to award, the solicitations were canceled and resolicited under a revised format which permits negotiation of the discount rates applicable to any additional price lists.

We found the revised solicitation provided materially different terms and conditions because it significantly reduced the risk of loss otherwise assumed by bidders regarding the discounts applicable to additional price lists required during the contract period. Accordingly, we determined the contracting officer's actions in canceling the IFB's were proper.

Wheeler Brother's request for reconsideration is based on the following:

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1. The decision of November 11, 1976, misconstrued the Air Force's reasoning for canceling the procurements. The Air Force based its decision to cancel on the possibility of lower prices on NPL parts because of an ability to negotiate discount terms for these additional lists. Only collaterally did it attempt to expand the scope of competition.
2. The decision did not specifically address the point raised by the protester that for a compelling reason to exist, the prospect of substantial savings must not be speculative.
3. Wheeler Brothers remains of the view that contrary to the Air Force's surmise, bidders did not include contingencies in their bid prices to cover any anticipated "losses" because of the inclusion of additional price lists at fixed discounts.

The agency comments to the conference held during our initial consideration of the protest set out the position that the inclusion of additional price lists of formerly NPL parts had a deterrent effect on competition. It reads in pertinent part:

"Situations as described above could and in fact did prevent potential contractors from entering into competition due to the uncertainties and unknowns. Thus, we were of the opinion that the less chance there is of COPARS contractors to experience substantial non-recoverable costs, the greater an opportunity there is to generate competition. Moreover, we believed that a savings to the Government would occur through higher discounts on bids. This will be made possible by the recent revision to the new COPARS contract format as it provides for negotiated discounts on price lists added after contract award." (Emphasis supplied.)

Even assuming, without deciding, that the Air Force (as alleged by Wheeler Brothers) only collaterally attempted to expand the scope of competition, CAO is obligated to consider all relevant circumstances including any which may not have been considered initially by the contracting officer. Juanita H. Burns, 55 Comp. Gen. 587, 588 (1975), 75-2 CPD 400; Hercules Demolition Corporation, B-186411, August 18, 1976, 76-2 CPD 173. The agency's reasons for cancellation are two-fold; first, full and adequate competition was not obtained due to the NPL schedules and second, savings to the Government were possible due to higher discounts on bids.

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With regard to the stifling effect on competition the possibility of adding additional price lists on NPL parts could have had, the agency states:

"The considered impact on price that could have occurred on the new COPARS format prior to the revision, which currently permits negotiation for discount on added price lists, can be demonstrated as follows: Assume there were two Dempster Dumpsters that required new hydraulic lift mechanisms at a facility where parts for this equipment were not initially price listed. The cost of those two units could run to \$6,000. If the COPARS contractor was unable to get a discount on those items, yet under the contract, a price list had been added for the subject equipment, it is feasible that the contractor would incur a sizeable loss and this could certainly have happened if the added list was placed under a section of the contract that had a high discount rate. The same could happen in the Original Equipment Manufactured (OEM) area with Caterpillar Tractors. Assume an Air Force base had one such tractor and the COPARS contractor had not provided a related price list in his bid. When, subsequent to award, the facility received three additional used Caterpillar tractors from another installation. The addition of a Caterpillar price list by the contracting officer could have a detrimental effect. Had the contractor originally provided a 20 percent discount on OEM, and with the addition of a Caterpillar Tractor price list that may provide from zero to 10 percent discount to the contractor, then 10 to 20 percent discount of the costs generated for replacement parts such as new tracks plus all of the associated transportation charges would be borne by the contractor. On NPL parts, the Government pays the transportation charges, but on price listed parts the transportation charges are paid by the contractor. Hence, the adding of a price list places the burden of payment of transportation charges on the contractor and in many cases becomes a substantial portion of the price."

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The Air Force surmised that there existed not only a situation where a contractor could be placed in a loss position, but that based on prior COPARS experience such could occur quite frequently.

The affidavit of an executive of Wheeler Brothers stated the fact that NPL parts may become price listed and thus subject to the percentage discounts bid in other sections of the IFB is not a substantial consideration for the bidder as the addition of price lists will occur very infrequently.

The requirement of additional price lists occurs when NPL part sales exceed 30 percent of the total sales. In this regard, the Air Force stated that in June and July 1976 the volume of NPL parts at Pope Air Force Base (the same base used in Wheeler Brothers' affidavit) was approximately 21 percent and 48 percent. Further, the current contractor provided the figures at Pope AFB for August and September 1976 at 41 and 33 percent.

Wheeler Brothers contends, however, that the NPL purchases at Pope Air Force Base during June and July of 1976 are not relevant to the issue at hand as the NPL parts bought during those months were under a COPARS contract format which did not require the extensive initial price list coverage that the new format required. As a result, Wheeler Brothers concludes that NPL parts would, by definition, have to be higher under the old format. Further, Wheeler Brothers points out that recent NPL sales under the format here in issue during the months of October, November and December 1976 equaled only 24 percent at Cannon Air Force Base.

With regard to the allegation that the historical data obtained under the old COPARS contract format is not relevant, the effect any increased price list coverage may have on NPL sales is speculative. In fact, the current contractor contends that the old and new COPARS formats are identical with little if any change.

The fact that after cancellation events do not occur as anticipated is irrelevant to the reasonableness of the decision, which must be judged on the basis of information then available. At the time of cancellation, all available evidence seemed to indicate that the NPL provision would be invoked in a significant number of cases. In fact, the agency had estimated NPL sales to be over 37 percent at MacDill Air Force Base.

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Finally, the protester argues that it was the Air Force's position at the conference that the inclusion of additional price lists would most likely occur in connection with original and equipment replacement parts obtainable only from original equipment manufacturers (OEM) but for which the bidder did not provide price list coverage in its bid (Item 1b of section E). The discounts bid for item 1b of Section E, OEM parts, tended to be extremely low and within the general range of 0-10 percent.

It is well established that the decisions of our Office are based upon the written record. See 40 C.F.R. part 20 (1976). Additionally, a bid protest conference is not a formal hearing nor intended to be a full-scale adversary proceeding. See Julia Research Laboratories, Inc., 55 Comp. Gen. 374, 389 (1975), 75-2 CPD 232. The protester's interpretation of what was said at the conference does not, without more, establish the fact alleged even though submitted in writing. Notwithstanding the protester's contention to the contrary, the record before this Office does not indicate that most price lists will be added under item 1b. Additionally, the protester has not shown that where additional price lists are required for items other than under item 1b, the contractors will be able to get the same discounts for items on the additionally required price lists.

As stated in our prior decision, the decision of the administrative agency whether or not to cancel will not be reversed unless shown to be arbitrary and capricious or contrary to law. We are not convinced that factual error has been shown which would require a different result than reached in our prior decision. The historical data and future estimates on NPL sales pointed to the situation where the addition of price lists would occur with some frequency. Wheeler Brothers' arguments, however, do not go to the accuracy of the data but rather its interpretation. In fact, in its request for reconsideration, Wheeler Brothers has essentially only sought review of arguments previously considered in deciding the case originally. While the data may be said to be capable of supporting another interpretation, we cannot conclude that the agency's determination lacked a reasonable basis merely because Wheeler Brothers feels its interpretation to be more realistic. Based on the record before our Office, the protester has not shown by clear proof that the agency has abused its discretion in canceling the procurement.

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In reaching this conclusion, we do not need to resolve the protester's contentions that the prospect of substantial savings on reprocurement was speculative. Furthermore, we do not believe on the basis of the record that Wheeler Brothers has demonstrated an error of law in our earlier decision.

Accordingly, our prior decision of November 11, 1976, is affirmed.

By [Signature]
Acting Comptroller General
of the United States